Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Tariff Filing Requirements for Interstate Common Carriers	)	CC Docket No. 92-13

COMMENTS

U S WEST Communications, Inc. ("U S WEST"), through counsel and pursuant to the Federal Communications Commission's ("Commission" or "FCC") Notice of Proposed Rulemaking ("Notice" or "NPRM"),[1] hereby files its Comments on the lawfulness of the Commission's forbearance policy.

I. INTRODUCTION

The Commission's current forbearance policy is a product of its Competitive Carrier proceeding. The Commission initiated the Competitive Carrier Rulemaking proceeding, CC Docket No. 79-252, in 1979[2] "to update [its] regulatory scheme in view of the significant changes in the telecommunications industry since the enactment of the Communications Act ["Act"] in 1934, particularly the emergence of a more competitive marketplace."[3] In its First Report, the Commission created two

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[1] 7 FCC Rcd. 804 (1992).

[2] See Policy and Rules concerning rates for competitive common carrier services and facilities authorization therefor, Notice of Inquiry and Proposed Rulemaking, 77 F.C.C.2d 308 (1979) ("Competitive Carrier Rulemaking Notice").

[3] Second Report, 91 F.C.C.2d 59 ¶ 1 (1982). See also Competitive Carrier Rulemaking Notice, 77 F.C.C.2d at 309-10 ¶¶ 1-3.

classes of common carriers, dominant and non-dominant, and established a different regulatory scheme for each class of carriers.[4] In its Second Report, the Commission relieved terrestrial resellers from Section 203(a)'s requirement that they file interstate tariffs.[5] The Commission extended its forbearance policy to all other non-dominant interstate common carriers in its Fourth Report.[6]

The Commission's forbearance decisions were based on its conclusion that it had the authority to refrain from applying Title II's requirements where the "overriding goals" of the Act would be frustrated.[7] In its Sixth Report, the Commission made its forbearance policy mandatory and directed all non-dominant carriers to cancel their existing tariffs and prohibited them from filing new tariffs.[8] MCI Telecommunications Corporation ("MCI") appealed the Commission's Sixth Report and the Court held "that the Commission lacks authority to prohibit MCI and similarly situated common carriers from filing tariffs that by

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[4]See First Report, 85 F.C.C.2d 1, 20-35 ¶¶ 54-101 (1980). Carriers with sufficient market power to control price were classified as dominant and remained subject to traditional regulation. See id. at 20-21 ¶¶ 54-56. Those carriers lacking market power were classified as non-dominant and subjected to streamlined regulation with reduced tariff filing and Section 214 requirements. See id.

[5]Second Report, 91 F.C.C.2d at 71-74 ¶¶ 21-30.

[6]Fourth Report, 95 F.C.C.2d 554, 578 ¶ 36 (1983).

[7]Further Notice, 84 F.C.C.2d 445, 447-48 ¶¶ 7-10 (1981). See also Second Report, 91 F.C.C.2d at 65-66 ¶¶ 12-13.

[8]Sixth Report, 99 F.C.C.2d 1020, 1034 ¶¶ 23-24 (1985).

statute every common carrier shall file."[9] The Court did not reach the issue of whether common carriers were required to file tariffs under Section 203(a) (i.e., whether the Commission's orders on "permissive" forbearance are lawful.)[10]

On August 7, 1989, the American Telephone and Telegraph Company ("AT&T") filed a formal complaint against MCI alleging that MCI was violating Section 203(a) of the Act by providing common carrier services at rates other than those contained in its interstate tariffs.[11] Subsequent to AT&T's complaint, the Supreme Court issued its decision in Maislin Industries, U.S. v. Primary Steel, Inc. ("Maislin").[12] In Maislin, the Court reviewed the tariff provisions of the Interstate Commerce Act,[13] which are virtually identical to those of Section 203 of the Communications Act, and held, among other things, that: 1) the filed rate is the only lawful rate that a common carrier may charge;[14] 2) "the filed rate doctrine . . . follows from the requirement that only filed rates be collected . . ., the requirement that rates not be discriminatory . . ., and the requirement . . . that carriers adopt reasonable rates and

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[9]MCI Telecommunications Corp. v. F.C.C., 765 F.2d 1186, 1188 (D.C. Cir. 1985)("MCI v. F.C.C.").

[10]Id. at 1190 n. 4, 1196.

[11]See AT&T v. MCI, File No. E-89-297.

[12]110 S. Ct. 2759 (1990).

[13]49 U.S.C. § 10761(a).

[14]Maislin, 110 S. Ct. at 2766.

practices[;]"[15] and 3) the Interstate Commerce Commission "does not have the power to adopt a policy that directly conflicts with its governing statute."[16]

On January 28, 1992, the Commission partially denied and partially dismissed AT&T's complaint[17] and initiated the instant proceeding to address many of the same issues that AT&T raised in its complaint.

While U S WEST has always been of the firm belief that Section 203(a)'s tariff requirements apply equally to all common carriers,[18] the Court's decision in Maislin erases all doubt. Section 203's provisions do not differentiate between dominant and non-dominant carriers but apply equally to all common carriers.

II. SECTION 203 IS CLEAR ON ITS FACE: ALL COMMON CARRIERS "SHALL" FILE TARIFFS

Section 203(a) of the Communications Act states that:

> Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for

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[15] Id. at 2767.

[16] Id. at 2770.

[17] See AT&T v. MCI, Memorandum Opinion and Order, 7 FCC Rcd. 807 (1992).

[18] See generally MCI Telecommunications Corporation v. F.C.C., Court of Appeals for the D.C. Circuit, Case No. 85-1030, Brief of Intervenors The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company, filed Apr. 16, 1985.

> itself and its connecting carriers . . . and showing the classifications, practices, and regulations affecting such charges.[19]

The language of Section 203(a) is not discretionary; it is mandatory.[20] The Commission may not ignore the intent of Congress as expressed in the plain language of Section 203(a).[21] As such, the Commission cannot relieve certain common carriers from the obligation to file tariffs through use of its rulemaking authority. Any such rules would be contrary to the requirements of Section 203(a) and the Commission "does not have the power to adopt a policy that directly conflicts with its governing statute."[22]

Section 203(b)(2) provides no basis for the Commission to exempt non-dominant carriers from Section 203(a)'s tariff filing requirements.[23] The Court rejected this argument in

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[19]47 U.S.C. § 203(a).

[20]"'[S]hall' is the language of command[.]" Escoe v. Zerbst, 295 U.S. 490, 493 (1935).

[21]"If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, U.S.A., Inc. v. Natural Resources Defense, 467 U.S. 837, 842-43, reh. denied, 468 U.S. 1227 (1984).

[22]Maislin, 110 S. Ct. at 2770.

[23]Section 203(b)(2) provides:

> The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and

reversing the Commission's mandatory forbearance policy in MCI v. F.C.C.[24] The Court held that Section 203(b)(2) did not provide the Commission with authority to order wholesale abandonment or elimination of Section 203(a)'s requirement to file tariffs.[25]

Similarly, the general provisions of Section 154(i)[26] do not provide the Commission with authority to ignore the specific dictates of Section 203(a). It is a fundamental rule of statutory construction that when general and specific terms of a statute are in conflict -- the specific terms control.[27] It is inconceivable that Congress intended Section 154(i)'s general provisions to override Section 203(a)'s specific tariff filing requirement given that this requirement is "'utterly central'" to the administration of the regulatory scheme embodied in the Act.[28]

Section 203(a)'s requirement that common carriers file tariffs is mandatory. It applies equally to all common carriers

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twenty days.

47 U.S.C. § 203(b)(2).

[24]765 F.2d at 1191-92.

[25]Id. at 1192-93 (citing American Telephone & Telegraph Co. v. F.C.C., 572 F.2d 17 (2d Cir.), cert. denied, 439 U.S. 875 (1978), and American Telephone & Telegraph Co. v. F.C.C., 487 F.2d 865 (2d Cir. 1973)).

[26]47 U.S.C. 154(i).

[27]See Sutherland Stat. Const. § 46.05.

[28]Maislin, 110 S. Ct. at 2769 (citing Regular Common Carrier Conference v. United States, 253 U.S. App. D.C. 305, 308, 793 F.2d 376, 379 (D.C.Cir. 1986)).

and does not leave room for exceptions based upon regulatory classifications of carriers. It is all but impossible for the Commission to determine whether rates are just and reasonable and whether unreasonable discrimination exists if some common carriers are not required to file tariffs.[29]

III. CUSTOMERS PURCHASE OFF-TARIFF SERVICES AT THEIR PERIL WHEN FILED RATES EXIST

While it is unlikely that an economically viable common carrier (i.e., those carriers not in bankruptcy) will attempt to collect its filed rates from customers with whom it has negotiated off-tariff contracts, Maislin holds that carriers can collect their filed rates.[30] In fact, the only legal rate is the filed rate and deviation from it is prohibited.[31] The only exception to this rule is if the filed rate is found to be unreasonable by the Commission.[32] Even in such a case, the off-tariff rate would still not be a lawful rate and could not be lawfully collected by the carrier.[33]

To collect other than the filed rate would be to allow carriers to engage in the very discrimination that the Act was

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[29]Id. at 2766-69.

[30]Id. at 2763-66.

[31]Id. at 2766. See also Arizona Grocery Co. v. Atchison, T.& S.F.Ry. Co., 284 U.S. 370, 384 (1932); Louisville & N. R. Co. v. Maxwell, 237 U.S. 94 (1915)("Maxwell"); Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981).

[32]Maislin, 110 S. Ct. at 2767 (citing Maxwell, 237 U.S. at 97).

[33]Id. at 2762-63.

designed to prohibit.[34] Neither customer ignorance of the filed rate nor equity allow a carrier to deviate from its filed rate.[35] The Court reiterated this point in Maislin:

> Indeed, strict adherence to the filed rate has never been justified on the ground that the carrier is equitably entitled to that rate, but rather that such adherence, despite its harsh consequences in some cases, is necessary to enforcement of the Act [Interstate Commerce Act].[36]

Thus, a customer purchasing common carrier services under off-tariff agreements where filed rates exist could find itself facing an action for recovery of higher filed rates.[37] Under the filed rate doctrine the customer has virtually no defense to such an action and must pay the filed rate unless it is found to be unreasonable.[38]

IV. THE COMMISSION MAY FIND THAT CERTAIN SERVICES OFFERED BY COMMON CARRIERS ARE NOT SUBJECT TO TITLE II REGULATION

While the Commission may not relieve common carriers of the requirement to file tariffs, the Commission may find that certain services or packages of services are not common carrier

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[34] Id. at 2767-69.

[35] Texas & P. R. Co. v. Mugg & Deyden, 202 U.S. 242, 245 (1906).

[36] Maislin, 110 S. Ct. at 2769.

[37] Any customer who "knowingly" receives such an off-tariff discount from tariffed rates would appear to be in violation of Section 503(a) and subject to a forfeiture equal to three times the value of the discount in addition to other penalties. See 47 U.S.C. § 503(a).

[38] Maislin, 110 S. Ct. at 2763-2769.

offerings[39] and, therefore, not subject to Title II regulation including the requirement to file tariffs.[40] In making such a finding the Commission may not "abdicate its responsibility" to enforce the provision of the Communications Act.[41] "But the public interest touchstone of the Communications Act, beyond question, permits the FCC to allow the marketplace to substitute for direct Commission regulation in appropriate circumstances."[42]

Thus, the Commission may find that the public interest is served by classifying certain services or packages of services

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[39]See NARUC v. F.C.C., 525 F.2d 630, 640-42 (D.C. Cir.), cert. denied sub nom. National Association of Radio-Telephone Systems v. F.C.C., 96 S. Ct. 2203 (1976). In reiterating the Court's holding in NARUC, the Commission has stated that:

> whether a service may be provided on a non-common carrier basis [depends on]: (1) whether there is or should be any 'legal compulsion' to serve the public indifferently; and (2) if not, whether there are reasons implicit 'in the nature' of the service 'to expect an indifferent holding out to the eligible user public.'

Tariff/Facilities Authorization, 97 F.C.C.2d 978, 982 ¶ 5 (1984).

[40]Wold Communications, Inc. v. F.C.C., 735 F.2d 1465, 1475-76 (D.C. Cir. 1984)("Wold"). In Wold, the Court upheld the Commission's decision authorizing that satellite transponder service be provided on a non-common carrier basis. Similarly, in its Computer II Inquiry, the Commission found that enhanced services were not common carrier services and, therefore, not subject to Title II regulation. See Second Computer Inquiry, 77 F.C.C.2d 384, 417-435 ¶¶ 86-132 (1980); Computer and Communications, Etc. v. F.C.C., 693 F.2d 198, 209-212 (D.C.Cir. 1982), cert. denied sub nom. Louisiana Public Service Commission v. F.C.C., 461 u.S. 938 (1983).

[41]Wold, 735 F.2d at 1475.

[42]Id. at 1475 (citing FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981)).

as non-common carrier offerings.[43] Such a Commission finding would apply equally to all providers of these services and would be a rational basis for introducing greater competition into the telecommunications marketplace. Not only would it insure that all carriers are treated equally but it would avoid the inherent discrimination which currently exists with off-tariff service offerings of non-dominant carriers.

V. CONCLUSION

As the foregoing demonstrates, the Commission does not have the authority to relieve non-dominant carriers or any other common carriers from Section 203(a)'s mandatory requirement to file tariffs.

Respectfully submitted,

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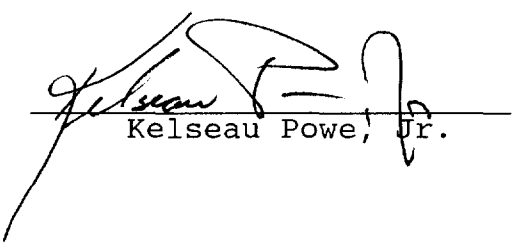
[43]In its special construction NPRM, Tariff/Facilities Authorizations, 97 F.C.C.2d at 990-94 ¶¶ 20-26, the Commission proposed to treat "extraordinary, customer-requested, individually-tailored construction and services" as non-common carriage.

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify on this 30th day of March, 1992, that I have caused a copy of the foregoing **COMMENTS** to be hand delivered to the persons named on the attached service list.



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